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No. 94-953

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

JESS T. SIMPSON, PETITIONER

v.

OFFICE OF THRIFT SUPERVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Office of Thrift Supervision timely exercised its statutory authority when it initiated proceedings against petitioner to require him to effect restitution to a solvent financial institution.

2. Whether petitioner was denied procedural due process because the Director of the Office of Thrift Supervision formally authorized the commencement of proceedings against him and also made the final administrative decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 29 F.3d 1418. The final Decision and Order of the Director of the Office of Thrift Supervision (Pet. App. C1-C83), as modified (Pet. App. D1-D8), is unreported. The decision of the administrative law judge (Pet. App. B1-B183) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1994. A petition for rehearing was denied on August 30, 1994. Pet. App. E1-E2. The petition for writ of certiorari was filed on November 23, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 12, 1991, the Office of Thrift Supervision (OTS) issued an administrative Notice of Charges to petitioner, the former president and chairman of the board of directors of Cascade Savings Bank (Cascade), a federally insured, OTS-regulated savings association located in Everett, Washington. Pet. App. F1.[1] Petitioner was charged with violating OTS regulations, engaging in unsafe and unsound banking practices, and breaching his fiduciary obligations to Cascade, in connection with four separate transactions. *Id.* at F8-F28.

A full evidentiary hearing was held before an administrative law judge (ALJ) in Seattle between August 26 and 31, 1991. Pet. App. B10. The ALJ issued proposed findings of fact and conclusions of law on December 17, 1991. *Id.* at B87. The ALJ recommended, with respect to three of the transactions, that an order be entered directing petitioner to pay restitution to Cascade, and prohibiting him from future participation in the conduct of the affairs of Cascade and other insured depository institutions. *Id.* at B83-B87.[2] With respect to two of the three transactions, the ALJ also recommended that petitioner be ordered to pay approximately $140,000 in civil money penalties. *Id.* at B85-B87, B182 n.**. Both petitioner and the OTS filed exceptions with the Director of OTS.

2. On November 18, 1992, the Director issued his final Decision and Order. Pet. App. C1. The Director deter-

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[1] The OTS is the federal banking agency responsible "for the examination, safe and sound operation, and regulation of savings associations." 12 U.S.C. 1463(a)(1) (Supp. V 1993).

[2] The parties resolved the allegations regarding the fourth transaction prior to the hearing. Pet. App. B2-B3.

mined that, between 1981 and 1990, petitioner violated OTS regulations, engaged in unsafe and unsound banking practices, and breached his fiduciary obligations to Cascade, with respect to all three transactions. *Id.* at C39-C67. Pursuant to 12 U.S.C. 1818(b) and (e) (Supp. V 1993), the Director ordered petitioner to cease and desist from further violations, unsafe or unsound practices, and breaches of his fiduciary obligations; ordered petitioner to make restitution to Cascade (totalling approximately $1 million); and prohibited petitioner from future participation in the conduct of the affairs of Cascade and other insured depository institutions. Pet. App. C80-C83. The Director declined to impose civil money penalties on petitioner, notwithstanding the ALJ's recommendation. *Id.* at C70-C74.

3. The court of appeals affirmed. Pet. App. A1. It rejected petitioner's claim that OTS's claims were time-barred, holding that there is no federal statute of limitations applicable to OTS enforcement actions brought under 12 U.S.C. 1818 (Supp. V 1993) and declining to import a limitation period from state law. Pet. App. A31-A32. The court also held that the Director's dual role as initiator of the proceedings and final administrative decisionmaker was not a violation of procedural due process. *Id.* at A27-A31.[3]

ARGUMENT

1. Petitioner's arguments that the OTS lacked jurisdiction over petitioner (Pet. 47-60) and that its

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[3] Petitioner also contended that adjudication of his case in an administrative proceeding was a violation of separation of powers and his Seventh Amendment right to a jury trial and that there was not substantial evidence to support the OTS's decision. The court rejected these claims (Pet. App. A16-A26, A33-A40), and petitioner does not seek further review (Pet. 57).

enforcement proceeding was barred by a state statute of limitations (Pet. 16-27) fundamentally misconceive the role of the OTS in this case. As petitioner notes (Pet. 11-12), Cascade has not been put into either a receivership or conservatorship by any governmental agency. Thus, the OTS is not "step[ping] into the shoes" of Cascade. See *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048, 2054 (1994). Instead, consonant with the intent of Congress, the OTS is acting in its role as enforcer of federal statutes, regulations and standards in an effort to deter future violations of such standards, to require petitioner to disgorge ill-gotten proceeds, and to restore Cascade to its rightful financial position. See 12 U.S.C. 1463(a)(1) (Supp. V 1993). The enforcement action did not supplant a private common law suit and the OTS did not "acquire" claims from Cascade. Instead, the OTS was attempting to further its statutory obligation to ensure the strength of financial institutions by pursuing affiliated persons who wrongly profited at their expense. See 12 U.S.C. 1811 note (Supp. V 1993) (reprinting Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, Tit. I, § 101, 103 Stat 187).

a. Petitioner suggests (Pet. 47-60) that FIRREA should be construed as not permitting the OTS to order him to pay restitution to Cascade because Cascade was a solvent institution that could have pursued common law claims against petitioner for money damages.[4] 12 U.S.C.

[4] This argument was not presented below. Petitioner did claim that the fact that Cascade was solvent was somehow relevant to the separation of powers challenge he made to the enforcement proceeding (Simpson C.A. Br. 16-17, 20-21; Pet. App. B25-B26), an argument he specifically abandons in his petition (Pet. 57). However, he never contended that the statute should be construed not to authorize the OTS's actions and the matter is therefore not

1818(b)(1) (Supp. V 1993) grants the OTS authority to initiate administrative proceedings "[i]f, in the opinion of the [OTS], any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party * * * has engaged * * * in an unsafe or unsound practice in conducting the business of such depository institution, or * * * has violated * * * a law, rule, or regulation." If, after a hearing, the OTS "find[s] that any violation or unsafe or unsound practice specified in the notice of charges has been established, the [OTS] may issue and serve upon the depository institution or the institution-affiliated party an order * * * to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice." *Ibid.*

Section 1818 is unambiguous. Petitioner concedes that he is an "institution-affiliated party." Pet. 52; see 12 U.S.C. 1813(u)(1) (Supp. V 1993) ("institution-affiliated party" includes "any director, officer, employee, or controlling stockholder * * * of * * * an insured depository institution"). Moreover, petitioner does not currently dispute the OTS's findings that he violated regulations, engaged in unsafe and unsound practices, and breached his fiduciary duties. Finally, petitioner does not claim that restitution is not the type of "affirmative action" which the OTS can require in a cease and desist order. See 12 U.S.C. 1818(b)(6)(A) (Supp. V 1993) ("affirmative action" includes requiring party to "make restitution").

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properly before this Court. See *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *Demarest* v. *Manspeaker*, 498 U.S. 184, 189 (1991).

Indeed, petitioner acknowledges (Pet. 52) that "[i]f FIRREA is read literally, the OTS did have the authority to bring this action." This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992) (citations omitted).[5]

b. Petitioner further argues (Pet. 16-27) that certain of the OTS's enforcement claims were governed by Washington State's three-year limitations period for fraud claims. This argument is predicated on the theory that the OTS acquired Cascade's common law claims

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[5] Far from contradicting the plain language of the statute, the legislative history of FIRREA supports giving the legislative language its unambiguous meaning. FIRREA was enacted in the context of a massive thrift industry crisis that was brought about in part by a failure of regulators to intervene in troubled institutions until it was too late. Petitioner's construction of the statute, which would restrict the OTS's ability to order restitution until *after* an institution was irretrievably damaged, is inconsistent with FIRREA's intent to "strengthen the enforcement powers of Federal regulators of depository institutions," and "strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors." 12 U.S.C. 1811 note (Supp. V 1993).

Petitioner's statutory construction argument rests on the proposition that if Cascade had sought similar relief under state or federal law, it would not have prevailed. Even if true, this claim is irrelevant. The OTS, a federal regulatory agency, brought the enforcement proceedings seeking both civil money penalties and restitution against petitioner pursuant to federal statutes enacted to protect the thrift industry, its depositors and the federal insurance fund. Its actions not only provided restitution for Cascade, but also served important deterrence functions.

against him. Pet. 22-23, 26-27. The court of appeals correctly rejected "at the outset petitioner's claim that the OTS acted in essence on behalf of Cascade in pursuing a damages claim recoverable under common law. The OTS acted independently pursuant to its congressionally mandated authority under 12 U.S.C. § 1811 *et seq.*" Pet. App. A18.

The OTS did not "acquire" any common law claims from, or assert any common law claims on behalf of, Cascade. Rather, as explained above, the OTS acted pursuant to federal statutory authority to initiate enforcement proceedings against institution-affiliated parties such as petitioner. See, *e.g.*, 12 U.S.C. 1818(b) and (e) (Supp. V 1993). Those federal statutes are part of a comprehensive bank regulatory scheme designed to promote the safe and sound functioning of the thrift industry and to safeguard the federal deposit insurance fund. See *Spiegel* v. *Ryan*, 946 F.2d 1435, 1438 (9th Cir. 1991), cert. denied, 112 S. Ct. 1584 (1992).

When a federal agency enforces a federal regulatory statute, the source of any limitations period must be a federal statute. "When the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement." *United States* v. *Summerlin*, 310 U.S. 414, 417 (1940). Since Congress has not provided a statute of limitations to govern these enforcement actions, there is no limitations period. See, *e.g.*, *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367 (1977); *Costello* v. *United States*, 365 U.S. 265, 281-283 (1961); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132-133 (1938); *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120,

125 (1886); *United States* v. *Knight*, 39 U.S. (14 Pet.) 301, 315 (1840).[6]

Petitioner argues (Pet. 24-25) that reading Section 1818 in this manner leads to "absurd" results that conflict with the six-year statute of limitations for suits brought by government agencies acting as receivers for insolvent institutions. However, Congress's decision to impose a limitations period on government agencies acting in the shoes of a failed financial institution is not material to its decision not to provide a statute of limitations for suits brought by government agencies as law enforcers. Cf. *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048, 2054 (1994).[7]

The court of appeals' decision is also consistent with 12 U.S.C. 1818(i)(3) (Supp. V 1993), which places a limit on the "jurisdiction and authority" of the OTS over parties who are no longer affiliated with a regulated financial institution. Section 1818(i)(3) requires the OTS to initiate any proceedings within six years of the party's "resignation, termination of employment or participation, or separation" from the institution.

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[6] See also *Dole* v. *Local 427*, 894 F.2d 607, 609-610 (3d Cir. 1990); *United States* v. *Tri-No Enters., Inc.*, 819 F.2d 154, 158 (7th Cir. 1987); *Donovan* v. *West Coast Detective Agency, Inc.*, 748 F.2d 1341, 1343 (9th Cir. 1984); *Marshall* v. *Intermountain Elec. Co.*, 614 F.2d 260, 262-263 (10th Cir. 1980); *Nabors* v. *NLRB*, 323 F.2d 686, 688 (5th Cir. 1963), cert. denied, 376 U.S. 911 (1964).

[7] Similarly inapposite are petitioner's citations (Pet. 21-22) to cases that hold that a federal agency may not revive claims for which the state limitations period has already expired. In those cases, the Federal Deposit Insurance Corporation or the Resolution Trust Corporation was attempting to assert the claims of the institution to which the agencies had succeeded, either as receiver or assignee. Those cases are not germane because the OTS here was not asserting claims acquired from Cascade.

Regardless of the nomenclature used to describe Section 1818(i)(3),[8] it is no bar to the OTS's actions in this case, where petitioner resigned from Cascade in March, 1990 (Pet. 11), and the OTS initiated proceedings against him less than one year later in February, 1991 (Pet. 13).

2. Petitioner also argues (Pet. 27-47) that his procedural due process rights were violated because the Director of the OTS acted as investigator, prosecutor and judge in the administrative proceeding in this case. Petitioner's claim is based on a misapprehension of the allocation of administrative responsibilities within the OTS.

The administrative proceeding against petitioner was instituted by a Notice of Charges signed (but not prepared) by the Director. In so doing, the Director was exercising authority given to him by 12 U.S.C. 1818(b)(1) (Supp. V 1993) to initiate cease and desist proceedings against an institution-affiliated party who "in the opinion" of the OTS Director had engaged in certain proscribed activities, such as unsafe and unsound banking practices or violations of statutes or regulations.

Although the Director signs the Notice of Charges, that Notice does not represent a final determination by the Director of petitioner's guilt. In fact, the Director's "participation at the commencement of the proceedings [is] minimal." Pet. App. A28; cf. *FTC* v. *Standard Oil*

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[8] In the court of appeals, the OTS suggested that Section 1818(i)(3) might serve as a statute of limitations. Gov't C.A. Br. 34-36. Unlike a statute of limitations, however, which normally accrues from the date of claimed injury, Section 1818(i)(3) establishes a limit tied to the date of a party's separation from an OTS-regulated institution. It therefore might be better characterized as either a statute of repose or a jurisdictional limitation.

Co., 449 U.S. 232, 241 (1980) ("By its terms, the Commission's averment of 'reason to believe' that [a person] was violating the Act is not a definitive statement of position. It represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings.").

As prescribed by regulation, the prosecution of the OTS's case against petitioner was handled by attorneys from the Enforcement Division of the Chief Counsel's Office. 12 C.F.R. 509.2(d) and (g) (1990). An adversarial hearing was conducted before an independent ALJ in accordance with the requirements of the Administrative Procedure Act. 12 U.S.C. 1818(h)(1) (Supp. V 1993) (incorporating 5 U.S.C. ch. 5); 12 C.F.R. Pt. 509 (OTS's regulations governing hearings). At the conclusion of the hearing, both parties were entitled to, and did in fact, submit proposed findings of fact and conclusions of law. 12 C.F.R. 509.27(a). The ALJ issued recommended findings of fact and conclusions of law, 12 C.F.R. 509.27(b), to which both parties took exception, 12 C.F.R. 509.29. The Director made the final administrative determination, in a lengthy, carefully reasoned decision which rubber-stamped neither the Notice of Charges nor the ALJ's recommendations.[9]

During the entire proceeding, the Director was prohibited from *ex parte* contacts with the ALJ or enforcement counsel, 12 C.F.R. 509.7(b) (1990), and while the Director was reviewing the matter, he was pro-

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[9] For example, while the Enforcement Division had requested, and the ALJ had recommended, that civil money penalties be imposed against petitioner, the Director dismissed the civil money penalty aspect of the case. Pet. App. C70-C74. He also reduced the amount of restitution recommended by the ALJ for one transaction by $10,000 and increased the amount on another by $424,500. *Id.* at C50-C53, C63-C64.

hibited from consulting with OTS employees who had been engaged in either the investigatory or adjudicatory aspects of the case, 12 C.F.R. 509.32(a). There is nothing in the record to suggest that these prohibitions were not observed. Therefore, other than in the formal sense that the Director was the head of the agency which instituted the proceedings, nothing in the record supports petitioner's claim that the Director acted in both the roles of prosecutor and adjudicator.

The procedure followed in this case does not violate due process. The Due Process Clause forbids situations where "the probability of actual bias on the part of the judge or decisionmaker is too high." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975); see *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Absent special circumstances, which are not present in this case, vesting in one agency official the responsibility to institute proceedings and make adjudications is not such a situation. See *Withrow*, 421 U.S. at 52-53; *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971); *FTC* v. *Cement Inst.*, 333 U.S. 683, 701-703 (1948).[10] As this Court has explained, agency "administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow*, 421 U.S. at 55.

Nor has petitioner shown personal bias on the part of the Director. Petitioner makes much of newspaper

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[10] Petitioner's reliance (Pet. 29, 33, 37) on *In re Murchison*, 349 U.S. 133 (1955), is unavailing. As this Court noted in *Withrow*, 421 U.S. at 53:

> *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications.

reports of comments made by the Director in connection with other enforcement proceedings which suggest that he believed in strong enforcement of the federal banking laws. Pet. 39 n.8, 61-63. Petitioner concedes, however, that he "cannot point to any evidence in the record that the Director was biased against him *personally*." Pet. 45. Nor do the Director's views on the need for strong enforcement of federal banking laws disqualify him. See *United States* v. *Morgan*, 313 U.S. 409, 421 (1941) ("[O]fficers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case."); cf. 3 Kenneth C. Davis, *Administrative Law Treatise* § 19.3 (2d ed. 1980). Neither does the Director's preliminary opinion in instituting the proceeding constitute the type of interest sufficient to render the process unconstitutional. See *Withrow*, 421 U.S. at 58 ("The fact that the same agency makes [the initial charge and the ultimate adjudication] in tandem and that they relate to the same issues does not result in a procedural due process violation."). The only other court of appeals that has reviewed the statutory scheme involved in this case thus reached the same conclusion as the court below, that the requirements of due process were satisfied. See *Seidman* v. *OTS*, 37 F.3d 911, 924-926 (3d Cir. 1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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